UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Roanoke Division.

ANITA RUSSELL, Personal Representative for The Estate of Daniel Russell,

Plaintiff,

vs.

DENNEY WRIGHT, et al,

Defendants.

Civil No. 3:11cv00075

Roanoke, Virginia

December 11, 2012

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE GLEN E. CONRAD
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
The Miller Law Firm LLC
PETER A. MILLER
108 Railroad Avenue
Orange, VA 22960

For Deft. Wright:
Guynn Memmer & Dillon
ELIZABETH K. DILLON
415 S. College Ave.
Salem, VA 24153

For Deft. Taser:
Glenn Feldmann Darby & Goodlatte
JEREMY E. CARROLL
P.O. Box 2887
Roanoke, VA 24001-2887

Taser International, Inc.
ISAIAH FIELDS
17800 N. 85th St.
Scottsdale, AZ 85255

Proceedings recorded by mechanical stenography; transcript produced by computer.

APPEARANCES (Cont'd):

Court Reporter:

Sonia R. Ferris, RPR
U.S. Court Reporter
255 W. Main St. Room 304
Charlottesville, VA 22902
434-296-9284

THE COURT: Good afternoon, everyone.

Thank you for coming to Roanoke. I'm sorry the Charlottesville courtroom is not available for today's hearing.

I'll ask Ms. Moody to announce the style of the next case.

THE CLERK: Anita Russell versus Denney Wright and others, Civil Action 3:11cv75, for a hearing on motions.

THE COURT: I believe these are defendants' motions. Who wants to go first?

MS. DILLON: Your Honor, if I could go first?

THE COURT: That would be fine, Ms. Dillon.

MS. DILLON: May it please the Court, counsel. My name is Elizabeth Dillon. I'm here with an associate from our office, Jennifer Royer. It is our pleasure today to represent Deputy Denney Wright of the Appomattox County Sheriff's Office.

Your Honor, this case arises out of an incident that occurred on October 30, 2010, a little before midnight. Deputies Mattox and Wright -- and Wright is the only law enforcement defendant in this case -- were speaking in the parking lot at the high school and Deputy Mattox was dispatched to a call.

Since Deputy Wright was with him, they both responded. Sgt. Samms was also dispatched.

Dispatch informed them that they had just received a call from 7724 Red House Road, in Appomattox, and they were advised by dispatch that the teenager on the line advised his dad just kicked his little brother in the ribs, he's nine years old, we're going to be toning out for rescue and we'd like a deputy to respond. The father had been drinking and is still at the residence. They were then advised that the child we have on the phone advised his dad is getting in the vehicle right now and leaving and it's a farm use Chevrolet.

The officers responded to the house. As they were going to the house, they received the information that he was leaving the home in the farm use Chevrolet and Andrew, the oldest son, reports to dispatch that his dad did not stop for the officers.

Mr. Russell then proceeds at a high rate of speed for about .6 miles, despite the lights and sirens of the deputies' vehicles. He passes numerous driveways on the way. Deputy Mattox calls it into dispatch as a pursuit and says he's going about 60 miles per hour, according to his own speed. Finally, Mr. Russell applies brakes, puts his signal on and pulls into a parking area at the side of the road. He exits the

vehicle so quickly that Deputy Mattox, who was the first vehicle on the scene, pulls his service weapon and does not have time to turn his siren off. Mr. Russell approaches the officers. It's very unusual in the experiences of these deputies, Deputy Wright and Deputy Mattox, to have a citizen exit the vehicle and approach them like this.

Deputy Wright exits his vehicle with his X26 electronic control device, also commonly known as a Taser, although we understand that Taser is the name of a company. Both officers are speaking in loud voices and Deputy Mattox in particular repeats, shouting loudly at Russell to "get down, get down on the ground, get down." Mr. Russell makes no attempt to get down on the ground. His hands are going up and down. He's also got what looks like a button-up shirt or jacket loose over a T-shirt so the deputies cannot see his waistband. They cannot see the small of the back to see whether or not he has any weapons with him.

Deputy Mattox, who teaches defense tactics, after repeated commands have failed, says to Deputy Wright, "tase him." Deputy Wright knows Mattox thinks it's appropriate to do so. But he doesn't tase him right away. There are more commands. "Get down, get down on the ground." He does not get down. He makes no

attempt to get on the ground. Deputy Mattox moves back, retreats a little bit. Russell takes a step forward and approaches the officers again. That is when Deputy Wright deploys the Taser for a single deployment of five seconds. Mr. Russell crosses his arms and falls backwards. They then get his arms out from under him, handcuff him, pat him down and unfortunately, in this situation and unbeknownst to the officers, Mr. Russell had some health conditions, including heart conditions. At some point in time, he suffers cardiac arrest. He suffers anoxic brain injury. CPR is given to him by Sgt. Samms and Deputy Mattox. Deputy Wright is instructed to go back to the house and interview family members, the son in particular. Mr. Russell survives in the hospital and nursing home for approximately seven months and then passes away.

Your Honor, this is an excessive force case brought under the Fourth Amendment. So what we have to look at here is the perspective of the officers on the scene, as you well know. I would like to show a portion of the aligned videos, aligned by Mr. Fredericks, who is a video expert, to the Court. I won't show the whole thing, but I think a portion of the video is helpful to see.

Your Honor, you'll see, three videos will

come up. The first video is that of the Mattox vehicle. The second vehicle is that of the Wright vehicle. Then the final video that comes up is from the camera that's on the Taser itself. The sound is delayed, so the sound will start shortly.

(Video played).

This is Mattox proceeding towards the house in response to the call.

Now you see the right video comes up with Mattox in front of him.

There's the farm use vehicle driven by Mr. Russell proceeding the other way down the road.

Your Honor, before Mr. Russell is tased, the officers hear him say, "go ahead and shoot me." Later examination of the video by the video expert seems to indicate that he actually says words to the effect of "why don't you go ahead and tase me?" But both officers in their incident report, report they heard him say, "go ahead and shoot me." We would submit to the Court that whether he said "go ahead and shoot me" or "why don't you just tase me" is of no difference in this case because it had the same effect on how the officers viewed the situation. They viewed it as very unusual. They also viewed it as his clear intent not to comply with their commands. He was not going to do what they

told him to do, "get down on the ground."

Now, Your Honor, this is in Quik Time. What I'd like to do now is back up the video and we can go frame by frame and show the steps that Mr. Russell makes before he's tased. It's hard to see when you're watching that video just straight through, but going frame by frame, it's much easier.

I don't know if the Court has Quik Time. I was not very technologically savvy, but apparently, if you double click on this and then use your arrow keys, you can proceed frame by frame through the video. Your Honor is probably better at this than I am.

(Video played frame by frame).

But you can see him exit the vehicle. Mattox. This is Deputy Mattox who first exits the vehicle. Mr. Russell is approaching them, walking towards him.

Then you'll see Deputy Wright come into the view of the camera.

Sgt. Samms arrives on the scene at some point, but the officers were not aware that he had arrived on the scene.

Here comes Deputy Wright. Deputy Mattox is now retreating. He's backing up. You can see the laser from the Taser on Mr. Russell's chest. You see the

hands going up again. They had been down. Then you can see the step, Your Honor. He's advancing towards the officers. He's not complied at all with their verbal commands. He takes that step with his right foot. He's bringing the left foot up and then the Taser is deployed.

Your Honor, as the Fourth Circuit said in Wilson vs. Flynn, application of the Graham vs. Connor standards in an excessive force case is a highly fact dependent analysis.

Plaintiffs in this case attempt to manufacture issues of fact where none exist. We have the video. We know what the officers perceived. We know that the officers believed that Mr. Russell could hear them and understand what they were saying and that he failed to comply. Plaintiffs attribute motives to Mr. Russell's actions, but none of us know what his motives were. That's pure speculation.

They note that his arms were down and up as if in surrender, but there's no evidence of that. That's a motive that's just speculated about.

They note he pulled over at the first safe place, but again, that is not indicated by any of the evidence. The video shows numerous driveways along Red House Road, which is also known as 727, where he could

have pulled over.

They note he was confused by the flashing lights, the sirens and Mattox's aggressive actions. Again, there's no evidence to that. They did have an expert that said it appeared there was confused communication.

And they note that essentially, he believed he was already detained and they cite to cases where you can't use a Taser against someone who's detained. Certainly he was not detained and there is no evidence as to what he believed. He was approaching the officers and failing to abide by their verbal commands.

We have to look at this from the perspective of that reasonable officer on the scene and not with 20/20 hindsight. These circumstances were certainly tense and uncertain and rapidly evolving.

Your Honor, when we look to the cases, the Supreme Court has not issued any opinions with regard to the use of a Taser or an ECV manufactured by someone else.

We have in the Fourth Circuit the 2008 case, Orem, which involved the Fourteenth Amendment and not the Fourth Amendment. In that case, a woman was being transported to jail. She was handcuffed and hobbled and started banging her head and cursing and causing the

vehicle to rock. The officer stopped the vehicle. The officer that was behind that was following in another vehicle, while the officer driver was tightening the hobbling device, was having a loud confrontation with the suspect who was in the vehicle and used the Taser on her twice and commanded her to respect the officers. That is not similar to this case at all. Again, that was a Fourteenth Amendment case. The Court noted that the driver, a reasonable officer on the scene, did not find use of the Taser necessary.

In this case, we have two reasonable officers on the scene, one of whom was a defense tactics instructor, and he found it reasonable, obviously, to deploy the Taser as he instructed Deputy Wright. Deputy Wright made his own independent decision to do that. He evaluated the situation himself, but he also knew that Mattox, who taught defensive tactics, thought it appropriate and he did not do so until Mr. Russell made another step towards them.

In the Henry vs. Purnell case, Fourth Circuit, 2011, Your Honor, a suspect ran toward a house after he had gotten out of his truck. There was no command to stop and no verbal warning and in that case, the officer shot him in the elbow with his Glock service weapon, mistaking it for a Taser. The Court in that

case said we are specifically not saying whether or not a Taser would have been appropriate in this case. We are looking at this under a deadly force situation. You can't shoot a fleeing non-threatening misdemeanant.

The concurring opinion, however, talks about use of a Taser and compares the facts of the Henry case with McKenney vs. Harrison. In that case, the officers were inside the home with a gentleman who had three warrants against him for child support and he was warned not to do anything stupid, told that he did not want to be tased and he went towards the window. He was tased with a single shock. He falls out the window and later died of head injuries. The Court in that case said it was a split second decision. It was one shock and the alternative to subdue him by tackling him posed a risk of safety to the officers and did not ensure successful arrest. The McKenney Court also noted that the law was still evolving with regard to Tasers and local law enforcement policies reflect differing views of where Tasers fit on force continuum. The dissent noted the similarity of the facts and said allowances need to be made for honest mistakes by officers.

We then have a Western District case by 2011, decided by Judge Kiser, Thompson vs. City of Danville, where an aunt arrived on the scene of her

nephew's arrest and interfered with the arrest and was handcuffed. While handcuffed, she kicked back, hitting the officer's knee and struggled and the stun mode was used on her twice after she kicked the officer and struggled and then when failed to get in the car. That case cited two Eleventh Circuit cases, Floyd and Draper, which are included in the brief. Floyd, an Eleventh Circuit from 2011, the Court said it was clearly established in October, 2007, that a Taser could be deployed on a non-compliant suspect where the crime was minor and non violent. In that case, the suspect was thought to have struck his nephew at school. He was yelling at the boy. He refused to cooperate with the deputies. He moved towards the nephew and the was tased three times. The Court granted -- said qualified immunity was appropriate if the force had been excessive.

In Draper, a tractor trailer driver was pulled over for a faulty tail light, refused to submit documents after several requests and he was tased once.

There's also an Eastern District Court, Your Honor, cited by plaintiffs, where a husband called 911 because his wife was threatening herself with a knife. He then calls back and says to disregard. The officers forced their way into the house. They say they struggled

with the husband. The husband says there was no struggle and I have a witness on the phone and the Court found there were factual issues that precluded summary judgment in that case.

In this case, however, Your Honor, we have someone the officers know is accused of committing a violent crime; kicking his nine-year-old son in the ribs. They know that. They know that he has left the house and he failed to abide by their lights and sirens and a pursuit was called in. He exited the vehicle very quickly, which alarmed them and was unusual for the circumstances. They couldn't tell if he was armed, if he had any weapons and he kept advancing. He refused to obey their commands and they deployed the Taser.

We would submit, Your Honor, there is no Fourth Amendment violation; that the officers acted reasonably and used reasonable force under the circumstances.

When you analyze the Graham factors and you consider it in light of the Wilson vs. Flynn case where Mace was used, not a Taser, in that case there was a domestic dispute. The husband showed up with an intent to hurt his wife if she did not obey him. He had not physically harmed her at the time. So here we have a more severe case in the case at hand. The husband was

threatening to disable his wife's car and told her she was not going anywhere with the kids. He had torn up the house. They found that was threatening to everyone. The husband disobeyed the officer's orders and the daughter's pleas for him to cooperate. He resisted when they attempted to handcuff and there was no violation found, even though they punched him in the face and fractured his nose.

Even if, given these facts, the Court opined the force was excessive, we assert that qualified immunity protects Deputy Wright in this situation. It protects, as the Court said in Malley, all but the plainly incompetent and those who knowingly violate the law. Given the state of the law, Deputy Wright certainly acted as an officer who would not understand that his actions violated the Fourth Amendment in this case.

Plaintiff cites to internal policies which are not applicable to a constitutional analysis and even if they were, Deputy Wright complied with his policy, the policy of his office, and the training he had received. The policy allowed for him to use a Taser under these circumstances. The policy also said that center mass was the preferred target and Deputy Wright complied with that.

As the Sixth Circuit said in Hagans vs. Franklin County Sheriff's Office, only months before, in 2012, "the Taser remains a relatively new technology and courts and law enforcement agencies still grapple with the risks and benefits of the device."

Deputy Wright did not go hands on, did not use defense tactics on Russell because he was unsure whether Russell had any weapons. There's also statistics, Your Honor, that show that going hands on causes additional injury and a higher percentage of injuries to both officers and to suspects.

It is easy to look back now, knowing Daniel Russell was not armed, and say the officers should have, could have, might have, but we are not the personnel out in the middle of the night risking our lives dealing with a person reportedly who has committed a violent crime, indicates he will not comply and then advances on the officers.

Your Honor, we would ask this Court to grant Deputy Wright's qualified immunity. If not, find that there was no Fourth Amendment violation involved and we assert that the state claims of gross negligence of assault and battery cannot survive a finding of reasonableness. We have adopted the contributory negligence argument of Taser and clearly, Your Honor,

punitives cannot survive as there was no conduct motivated by evil motive or intent. There was no reckless or callous indifference and there was no egregious conduct.

Thank you.

THE COURT: I guess the most worrisome thing from your perspective, Ms. Dillon, is as I understand it, it is not clear to what extent the victim, the decedent, heard what the officers were telling him in terms of instructions when they first made contact. I still don't have a good feel. Where were the microphones? Where were the microphones that picked up the sound that we heard, the audio from this tape that we just viewed?

MS. DILLON: Your Honor, each officer has a mic, so -- and you can watch the videos separately, if you'd like, and it's easier to hear when you're watching them separately. But each officer has a mic. Then the Taser camera is actually on the Taser itself.

THE COURT: Did it have a mic as well?

MS. DILLON: Yes, it has a mic as well. Taser can confirm that -- yes. But it has a mic as well. That automatically comes on. You can't see initially on the Taser camera because Deputy Wright had his hand over the camera because he holds it with both

hands.

But Your Honor, the officers believed, and you'll see this in their declarations, that he could hear them and that was confirmed for them when they heard him say back, and they heard what -- "just go ahead and shoot me."

THE COURT: So we know that or I guess we could certainly assume for purposes of this exercise -- is it Mr. Russell?

MS. DILLON: Yes.

THE COURT: Mr. Russell did not hear quite as well at least to the same extent the officers did because they were there and the microphone was on their chest and the microphone was on the Taser itself. So obviously, the microphone was a lot closer to the speakers than was Mr. Russell. So we can assume he did not hear as well as we are now able to hear in viewing these audio and video tapes.

MS. DILLON: But Your Honor, the officers believed that he could hear them and they were purposely speaking very loudly to him.

THE COURT: That may be important for the qualified immunity analysis, but what about for the first part of the analysis? Would it have been the same if Mr. Russell had not heard anything? Let's assume for

purposes of the legal review that Mr. Russell heard nothing.

MS. DILLON: Your Honor, if there were indications that he couldn't hear at all, a hand to his ear, perhaps, which most people would understand is "I don't know what you're telling me" --

THE COURT: He had his hands up in the air at first.

MS. DILLON: They go down and up. But he makes no indication that he can't hear them. Then when he makes the statement to them that they heard, whether it was "go ahead and shoot me" or "why don't you just tase me," he is telling them "I'm not going to do what you want me to do" and they repeatedly give him the instruction in a very loud voice. So maybe he didn't hear it once or twice. But they say it over and over and over again, Your Honor.

THE COURT: That wasn't my question.

Let's assume for purposes of the exercise that he didn't hear anything and he is just speculating as to what they want him to do. He doesn't know if they want him to keep his hands up or to get down on the ground or to go back to his vehicle, that he has no idea as to what instructions he's received, then is the legal analysis the same?

MS. DILLON: Yes, it is, Your Honor, and it is the same because specifically, both under Graham vs. Connor and under the qualified immunity analysis, the Court looks at the scene from the perspective of the officer on the scene. Here, we have two officers who believed that they could be heard by Mr. Russell.

Mr. Russell could have -- we don't know. He could have been deaf. They could come across a suspect that has no idea what they're saying. But the Court says, we can't look back with hindsight. In both the Graham analysis for the Fourth Amendment violation and the qualified immunity analysis, we have to look at it from the reasonable officer on the scene.

In this case, we have officers who believed they could be heard, who believed he was willfully failing to comply and who made no action to get down and then says to them, "go ahead and shoot me" or "why don't you just tase me," which tells them "I'm not going to do what you want me to do."

Because of that, Your Honor, it doesn't change the analysis.

THE COURT: Thank you, Ms. Dillon.

MS. DILLON: Thank you.

THE COURT: Mr. Miller, do we want to separate the two defendants and have you argue as

regards the officer first and then respond to Taser's arguments later?

MR. MILLER: Yes, Your Honor, if you don't mind. And if the Court would indulge me, I'd like just a moment to set up the video.

THE COURT: That's fine.

MR. MILLER: Your Honor, I can start while he's doing that.

May it please the Court, my name is Pete Miller and I'm honored today to represent Mrs. Russell, who's here in the courtroom. I asked her to sit back in the back due to the sensitive nature of the conversation, and T.J. Shaw, a young attorney in the firm who understands computers much better than I do, and my son, Alex Miller, who wants to be an attorney some day, he tells me, and he wanted to come and hope he learns something.

Your Honor, I won't go through the complete set of facts as Ms. Dillon has already gone through it, just the points that I would dispute and I think that might be the best way to handle it.

She started out with the phone call that came from the teenage son indicating that the younger son had been kicked. Then she pointed out that Mr. Russell left the house and the young son said "dad did

not stop for the police officers." It's easy to watch the video and see as Mr. Russell is leaving the driveway, that is the point in time when the police officers arrive at the driveway. As the police officer turns in pursuit, Officer Mattox, and calls in that he's in pursuit, deposition testimony from both Wright and Mattox cannot put Mr. Russell that he's speeding. It's six-tenths of a mile before he goes to stop and pull into a parking lot and from the video, it's clear he goes over a hill and you lose sight of him. Clearly, as the police officer loses sight of Mr. Russell, Mr. Russell would have lost sight of them. Then as the police officers come over the hill, it's within ten seconds he puts on the brake, slows down, pulls into the lot. I think that's an important point because when looking at the severity of what the crimes he potentially committed, they tried to use a high speed pursuit and I don't believe there is a high speed pursuit and I believe the video speaks to that clearly. I think the video speaks to a number of issues.

The reason I cue this video up, what we saw earlier was the video from Officer Wright's car, the video from Officer Mattox's car and the video from the Taser device, all displayed on one screen. I think what that does is take attention away from Officer Wright's

vehicle camera that does such a good job of focussing on exactly what happened and it's better to see Officer Wright's camera to see an enlarged view.

Also, I'll point out when I deposed the video expert who put those three videos together, the audio was enhanced by someone other than someone in his office and he didn't know the specifics of how it was enhanced and I think it's better to hear the audio from the original source.

THE COURT: Okay.

MR. MILLER: I was going to spend some time, and the Court brought attention to it, and that is the siren and the fact it is so loud. That is such a pivotal point to our case, the volume of the siren.

The Court brings up a very good point and that is that the microphone is in the pocket of the police officers. As they're hollering "get down, get down on the ground," it's clearly going to be picked up by their microphones. That's a key point, but just as important is where the siren itself is and the siren itself is mounted between the headlights pointing forward. If you notice from the video, if you can see sound waves, then you would see Mr. Russell standing in the zone where that speaker is shouting right at him. We'll watch the video and see his actions.

I find it interesting that defense would argue that they felt clear -- the officers felt clear that Mr. Russell could hear everything that they were saying. However, they believe -- originally they said he said "go ahead and shoot me." Now they're saying he says "go ahead and tase me." This is a very material issue. I will state that I think a reasonable juror could conclude that what he actually says when we watch the video again is "are you going to tase me?"

When looking for cues on what senses, how much the sense of hearing is lost, not only is it putting a hand to the ear, but it would be such things as coming to a stop and standing still because you don't know what to do. The officers are hollering "get down on the ground." He stops. She wants to show it frame by frame and I have no problem with that. You do not see him making aggressive steps toward a police officer. You see a foot getting picked up. You do not see any aggressive steps.

What you do see, body posture wise, is "are you going to tase me?" When he immediately steps out of the vehicle, and I invite the Court to watch it again, it is not aggressive. He gets out of the vehicle quickly after he stops, but I would not classify it as aggressive. He approaches the officers and his hands

are out. He sees Officer Mattox with his firearm. Then as he sees Officer Wright with the Taser, his attention goes to Officer Wright and then you see his hands come out. I would submit you can hear him say, "are you going to tase me," just to show the confusion level is there. We believe that's what is driving this whole thing.

THE COURT: Is Ms. Dillon right? Isn't the Graham vs. Connor an objective standard? Would you have to be able to prove to a jury's satisfaction that the officers lied when they said we thought Mr. Russell could hear us?

MR. MILLER: It is an objective standard, but I think you could review this objectively and say a reasonable person would not conclude he did not say "shoot me," that there's enough audio there and enough body posture wise --

THE COURT: I'm backing up a few seconds before that exchange when the officers are heard on the video itself and clearly are telling Mr. Russell to get down on the ground and he did not comply. Your assertion is he did not hear that instruction.

MR. MILLER: Yes, Your Honor.

THE COURT: The officers believe that he did. So isn't it enough that they're able to say, well,

a reasonable -- we thought -- as reasonable officers, we thought we were speaking loudly enough for him to hear us and that he failed to comply with their instructions and therefore, we upped the level of force that we intended to apply?

MR. MILLER: I would dispute that theory this way, and that is that if you're only looking at the commands that are given and the lack of reaction to those commands, I would agree with the Court. But I think the reasonableness standard is a totality of the situation and clearly, it's the time line. It's -- when you watch the video, it is 15 or 16 seconds, not 17, from the time that man gets out of the vehicle until the time that man is tased. And that is quite an escalation of force to use in 16 seconds. The standard there is how serious of a crime did he commit, how much of a threat is he to the public or the officers and is he attempting to flee? Clearly he's not attempting to flee. He's just standing there. How much of a threat is he to officers? Again, he's standing there. You have Officer Mattox with his service weapon pointed right at the gentleman. You have what we believe is confusion and again, they're not sure what they hear. When I deposed Officer Wright, he stated it was extremely hard to hear and because of that, communication was extremely

difficult between him and Mattox and they were standing side by side. So to answer the Court's questions, the unreasonableness hinges on the time line, the fact it happens in 15 seconds. The constitutional right is if you're not resisting arrest, you're entitled to be free from excessive force while you're being arrested. Clearly, 15 seconds, and our expert will opine to that, it's the 15 seconds. Whether or not he hears, it's the -- unable to hear, but most importantly, the fact that it happens in such a short period of time.

THE COURT: That can cut both ways. Clearly this case is distinguishable from Draper where the officers engaged the truck driver for minutes, several minutes, trying to get him to get some relatively unimportant piece of paper before they tased him. Here, from all we see and all we know from the officers' depositions, they were trying to gain control of what they considered to be a volatile situation.

MR. MILLER: In Draper, I would argue that he's belligerent and it's clear there's communication and it's clear he is not going to work with the police officers and it's clear that he's done things in a violent nature.

THE COURT: It's also clear they're in control of him and the situation. They're just asking

to get some piece of paper. When he fails to comply, then they tase him. I think it's pretty easy to include that was unreasonable. Is it quite as easy to make that conclusion here?

MR. MILLER: Your Honor, I would say to the Court, the video shocks the conscience, the fact it happens so quickly. The police officers have left the siren on. There are so many other options. With one officer with a firearm pointed right at Mr. Russell, clearly Officer Wright with a Taser could have turned the siren off. Mr. Russell is not displaying any tendency to want to run, any threats. His hands are out to the side and when you watch the video closely, you'll see he gives a very confused, "are you going to tase me," not "go ahead and tase me," which I think is critical because what the defense is hoping for is that "go ahead and shoot me, go ahead and tase me, I'm a crazy man, I'm going to do whatever I feel like doing" and that's not the case here. This is a man who wants to comply. I don't believe he can hear a thing to comply and we have an expert to opine just to that and more importantly, he's tased in 15 seconds.

THE COURT: Okay.

MR. MILLER: I think we'll also have to consider the size. Mr. Russell was a small man. I want

to say 5-10, 145 pounds, and if I'm off by a little bit of size, I'm sure they'll point that out to me. But he's a smaller individual. Both of the officers that are there, healthy, quite capable, well trained in defensive tactics and in fact, their protocol, their use of force guidelines state that if someone is a passive resister that the resistance has to escalate before he's going to utilize the next level of force. I would state that there were lots of options to Officer Wright, available to Officer Wright and Officer Mattox, without tasing him in 15 seconds.

Mrs. Dillon states that it's reasonable because a second officer, Officer Mattox, is on the scene and he's saying "go ahead and tase him." Officer Wright elects to tase him on his own, he says in deposition. However, you have a second officer saying "go ahead and tase him." What our expert is going to opine to is the systemic nature of this and that is that over-dependency on Taser. Taser themselves use a slide in their slide deck for training of over-dependency of tasing. In their slide deck, they want their instructors to state and discuss don't use a Taser when the next level of force would be better. Don't use it as "I don't want to do other things that could be done" and I have direct testimony on that from the vice president of

training at Taser. Overusing Tasers is an issue and it's a problem and I think this case is the case that can bring that to light. I think it's unfair to say because there's a second officer there, that makes it reasonable. I think both officers were in that frame of mind of being over-dependent.

With regard to punitive damages, Your Honor, we would argue that it is very egregious to use a Taser, which is -- it certainly runs a risk of cardiac arrest, the risk of losing an eye, the risk of getting hit in the throat. There are many sensitive areas in the front of the human body. The decision tree for a police officer to use a Taser is a serious one. To make that decision in 15 seconds on a gentleman who is standing there and can't hear, we believe is a very egregious act.

I believe I've covered everything Ms. Dillon has commented on. I don't need to take too much time unless the Court has questions.

THE COURT: I think the most significant argument, I think, for the officer is the very point that you made a moment ago and that's that there are no cases that talk about use of Tasers, very few cases, and they all have facts that differ significantly from our case. So how could someone have been on notice that

this was not a reasonable escalation of the use of force? How could someone have understood that the Constitution prohibits this?

MR. MILLER: Well, Your Honor, there is case law out there. We rely on Brown vs. The City of Golden Valley and that is the nature of the resistance of the individual who's being tased. If it's an active resistance, then there's case law to support it's not unconstitutional for the perpetrator to be tased. If the resistance is passive and there is no threat, no danger to the officers, then tasing is unconstitutional and excessive. There certainly is case law out there and case law before this event.

It's a totality of the situation. Mrs. Dillon points out you can't solely rely on the training manuals and the doctrine of Appomattox County Sheriff's Office. But you certainly can include that in the totality of the situation. He had guidelines that were clear that such a situation did not require a tasing and he should have attempted some other means of force to apprehend Mr. Russell.

THE COURT: It seems to me the bright line, the line of demarkation is when would a reasonable officer feel that he was in control of the situation, that he was in control of the site? It seems to me that

again, to go back to cases like Draper, to go back to cases like Judge Kiser's case, it seems to me that the use of Tasers when courts have found it necessary to address the point, have generally been approved when the situation is influx, when there's no control over the defendant or the person who's ultimately tased except that I think Draper was an exception to that. Clearly they were in control of the situation and nevertheless, the use of a Taser was found to be appropriate there because the defendant was, the arrestee was being belligerent and uncooperative. It seems to me she makes a pretty good point about the control of this situation. From the officers' perspective, they didn't have Mr. Russell handcuffed. They didn't have him compliant. They didn't have him down on the ground. They weren't sure what he was going to do.

MR. MILLER: Your Honor, if the standard is control of the situation, then I think there were many other options available to the officers and many options available to a reasonable officer.

THE COURT: So the first one you suggested would be one of the two officers leaving the scene that was still not under control and turning off the siren.

MR. MILLER: It all depends on control of the scene. It's been 15 seconds since he exited the

vehicle. He's standing there making motions of "I'm confused, I don't know what to do." I don't think it's always incumbent on the perpetrator to show he's the one in control. What could Mr. Russell have done to show that, Mr. Officer, you're in control? How could Mr. Russell show they're in control when he's standing there and can't hear? I believe a reasonable officer could realize Mr. Russell is not moving, Mr. Russell is not a threat and we have one police officer with a firearm pointed at him. Who does it fall on to take control from the perspective of the officers? Do they not have -- given the factors that are involved at the time, I believe they do have control. They have a gentleman who has left his house. He's hit the brakes, put on the blinker, pulled into a driveway or a dirt lot. He exits his vehicle, faces the officers. There's no attempt to flee, there's no attempt to run. There's no threatening gestures with his hands.

THE COURT: He initially raised his hands and then he lowered his hands.

MR. MILLER: Your Honor, I agree. I don't think our expert or theirs or anybody is going to say this is a threatening gesture. He's standing there and given the totality of the situation, he is certainly -- appears to be a man who is agreeing to their control. He

just doesn't know what their control is. I think the onus is on the officers to understand. A reasonable officer would say clearly it's only been 11 seconds, 12 seconds, 13 seconds, we have control of this situation. They did have control of the situation. The next step is -- what is the next step? What is the officer going to do? He's got, like I say, a firearm and a Taser and this gentleman is not moving, what is Mr. Russell to do? Mr. Russell is standing there --

THE COURT: They want him to go down and be handcuffed.

MR. MILLER: I certainly understand, but our argument is he can't hear. I played the video without the enhanced audio to see -- it's amazing how loud it is. If you turn it up to try to hear what Mr. Russell says, the siren gets to the point there's no way anyone could hear and Mr. Russell is in that zone of noise. That siren is designed, it's for the individual in front of the police officer, the car, someone inside a car to hear. This gentleman is standing in front of it with his naked ears.

THE COURT: So if the siren had not been on and they instructed Mr. Russell repeatedly to get down and he refused, then would it have been okay to Taser him?

MR. MILLER: I would argue because he's not moving, I would believe 15 seconds is too short of a time in that scenario. But I don't believe those are the facts in this case. But 15 seconds, if he's not advancing toward the officers -- if he was advancing toward the officers aggressively and the officers felt he could hear, then Taser is a tool. I'm not going to stand here and say it's a tool police officers don't use. This is not a case where it should have been used.

THE COURT: You say it doesn't matter whether they thought he heard them or not.

MR. MILLER: Yes, Your Honor. I fall back on the Court's term, control. I think there is control. If you have a gentleman that can't hear, the best he can do is stand and potentially ask a question. He's standing there saying, "are you going to tase me?" He's lost. He's standing there lost and 15 seconds is unreasonable for a police officer to get out of his car and tase someone standing there, in 15 seconds. The video shocks the conscience.

THE COURT: Thank you, Mr. Miller.

Do you want to have rebuttal or do you want Mr. Carroll to go next?

MS. DILLON: Do you mind if I rebut now? I'll make it very brief.

THE COURT: No. That would probably be the best course.

MS. DILLON: Your Honor, many other options is second guessing, pure and simple. Also, there's no evidence, only pure speculation that he couldn't hear. There's no evidence that he couldn't hear and indeed, the expert, we filed a motion to exclude the expert in certain areas because Dr. Alpert stated he's not a communications expert, he's not a human factors expert, he's not a body language expert, he's not an audio expert. Indeed, he has never opined it was more likely or not that someone could or could not hear something.

THE COURT: I kind of agree. I don't want to prejudge the Daubert motion of the expert, but it seems to me to be something within the common knowledge of everyone, but that, at the same time, suggests that it's a jury question, doesn't it?

MS. DILLON: Your Honor, in this case, we talk about the placement of the sirens. Well, the siren in Wright's vehicle was closer to the officers. So not closer to Mr. Russell. So that analysis doesn't work.

Also, Your Honor, there's no evidence --

THE COURT: But again, one of your officers testified it was awfully hard to hear.

MS. DILLON: Correct, but what did Mr.

Miller say? He said if he couldn't hear, he would stand still. He didn't stand still, Your Honor. What did he do? He sees a service weapon and he sees a Taser. What did he do? He started advancing on the officers again. If they're yelling at you and you can't hear and you should stand still, he doesn't do that. He advances again.

What are the officers to do then? Just let him keep advancing or keep retreating? Then he has access to their vehicles, to the Mattox vehicle? They should keep moving back? He advances again. He's not just standing still.

If they let him keep advancing, to what end? We don't know. We don't know.

But the officers are entitled not to take that chance. They are entitled to take control of the situation. They are entitled to do that.

I would just briefly point out, Your Honor, that the declaration of Grant Fredericks, the video expert, paragraph five, makes it clear that this is not an enhanced version of the video or audio. It's not enhanced. That's part of the record. That video is part of the record under seal, Your Honor.

Thank you.

THE COURT: Thank you, Ms. Dillon.

MR. MILLER: Your Honor, will the Court entertain a few comments?

THE COURT: Just regarding the matters she brought up on rebuttal.

MR. MILLER: Yes, Your Honor. Thank you.

Although it looks like a lot, there's only a couple things to reference.

THE COURT: I think the most important thing to rebut is whether or not the audio was enhanced.

MR. MILLER: Fine, Your Honor.

One other point, if I could, Your Honor, Ms. Dillon just made a good point. She said what should he do? He should have stood still. I think the video is a question for the jury and I think a reasonable juror is going to conclude he stood still. Just what she said he should have done, he did.

If I could, deposition of Grant Fredericks, page 86. Question by Mr. Miller, line two.

"And it's not based on any quality enhancement that you did to the audio, correct?"

And he's speaking to the video.

He said, "well, my technician did enhance the audio," in answer.

"Question: We are hearing the enhanced audio now?"

His answer: "Yes."

And I asked him his technician's name and all this line of questioning goes to the video.

One last point, Your Honor, responding to what Ms. Dillon said. It was Officer Wright's deposition when he was asked, "do you think it was extremely hard to hear?"

"Answer: Yes."

It was extremely hard to hear. All three of them were in this cone of noise. Just because the officers were there with Mr. Russell doesn't make it any easier to hear.

THE COURT: Mr. Carroll.

MR. CARROLL: Your Honor, three lawyers and three computers. If I may have a moment.

May it please the Court, Your Honor, Jeremy Carroll on behalf of Taser International. With me this afternoon is Isaiah Fields. He is counsel for Taser International as well and has been pro hac vice'd into this matter.

The products liability aspect of this case, Your Honor, relates to the Taser X26E electronic control device that was manufactured by Taser International and used by Deputy Wright to apprehend Mr. Russell on October 30, 2010.

Plaintiff advances two primary theories of recovery against Taser; a breach of implied warranties and negligence. The breach of implied warranties claims, Your Honor, relate to both the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. There are two separate negligence counts as well and then there's also a fifth count of punitive damages against Taser as well.

These product liability claims require a plaintiff to prove a defect which renders a product unreasonably dangerous. Traditionally, there are three methodologies for proving an unreasonably dangerous defect; negligent design, negligent manufacture or negligent failure to warn or inadequate warning.

The plaintiff has produced and presented no evidence of a design defect or manufacturing defect and proceeds exclusively under the theory that Taser has inadequately provided warnings with regard to the X26E.

Specifically, Your Honor, plaintiff contends that the warnings that were generated and produced and delivered by Taser failed to provide adequate warning of an alleged risk that deploying the Taser in the direction of the chest would have the possibility of inducing ventricular fibrillation and cardiac arrest, Your Honor.

To prevail on these products liability claims, the plaintiff would have to prove a defect and a causation, Your Honor. In the context of this case, they would have to demonstrate as to the defect that the warnings issued by Taser International prior to October 30, 2010, were inadequate and with respect to causation, they would have to prove that that alleged inadequacy was the proximate cause of Mr. Russell's injuries on October 30, 2010. Plaintiff cannot prove either defect or causation in this case, Your Honor.

The uncontroverted evidence is that Taser, six months prior to this incident, on May 1, 2010, issued its most recent cardiac and chest warnings and that those warnings while being delivered to the Appomattox County Sheriff's Office were never, in turn, provided to Deputy Wright and Deputy Wright, therefore, never read or reviewed those warnings.

Furthermore, Your Honor, the evidence in this case is that plaintiff's warnings expert, Dr. Laughery, never read or reviewed Version 17 of Taser's training materials, which was the version that was disseminated on May 1, 2010, or its May 1, 2010, product warnings. So they can neither prove causation because Deputy Wright did not read these warnings, nor can they prove the existence of a defect because their expert did

not even bother to read these warnings.

As to causation, Your Honor, the incident obviously occurred on October 30th, 2010. Plaintiff concedes on brief and indeed argues the issue in this case is whether as of that date, Taser had provided adequate warnings with respect to the X26E and any risk of cardiac risk for ventricular fibrillation. Again, on May 1, 2010, those very warnings had been issued by Taser. Indeed, they had been issued previously.

On September 29th, there were warnings issued on cardiac risk and December 4, 2009, there were training materials issued that also warned against shooting at the chest. Those are not the relevant ones for this case because on May 1, 2010, updated warnings and training materials were issued.

THE COURT: But as I understand it, the theory is that the warnings that were given in late 2009 were deceptive and may have misled a user as to the reason to be concerned about the shots from the Taser to the chest area as opposed to the lower abdomen.

MR. CARROLL: There's an argument, Your Honor, that plaintiff relies on a number of documents in the fall of 2009 which he alleges recanted or rescinded previous warnings. To quote from his brief, he refers to those documents as "subsequent statements" which

recanted earlier warnings.

At first blush, Your Honor, those could not have possibly recanted subsequent warnings. They could not have recanted the December 4, 2009, Version 16 training materials. And more importantly, they could not have recanted the May 1, 2010, training materials and product warnings, all of which were issued after those allegedly recanted documents.

Those documents also, Your Honor, there's no dispute Deputy Wright never saw any of those documents. So to the extent there's this allegation they recanted warnings, again, pre-existing warnings, Deputy Wright never saw them so they could have not have any impact on the causal link.

Third, Your Honor, those documents, the gist of those documents and the issues with those documents about which plaintiff complains is that they characterize the risk as remote and they seem to be or there's an allegation they were motivated by issues of risk management. The risk is remote, Your Honor. Plaintiff's expert described the issue as remote. Dr. Webster in his deposition described it as a low probability, very small, rare. Dr. Zipes, plaintiff submitted attached to his response brief Dr. Zipes' report. We objected to the report because it's not

sworn and doesn't meet the requirements for an affidavit, but what is interesting about it is it relies upon an article by a Dr. Lakkireddy. In that article, Dr. Lakkireddy described the risk as essentially zero. .4 per million was the number he put on it in one of his arguments.

So again, the risk is remote. So to accurately reflect the risk in those documents does not recant or rescind prior warnings. Plaintiff would have us exaggerate the risk if you take plaintiff's argument to its extreme -- really not even to its extreme, really just as he states it. But there's nothing in Virginia law that would require us to exaggerate a risk with respect to the Taser device.

Lastly, this recanting argument -- I'm getting a little off here. I was going to come to the recanting argument later. But it was specifically dealt with by the District Court in Mississippi in a case recently. We cited it on brief. Footnote five in that case, Your Honor, specifically dealt with it and rejected this very argument.

On brief, Your Honor, we cited a number of cases for the proposition that where a manufacturer has produced warnings and the user of the product has not read those warnings, the causal link is broken. There

cannot be proximate causation.

One of those cases, Your Honor, Fourth Circuit case, Rule -- again these were all cited in the brief -- but that was a medical device case. The doctor had used the device before and observed it being used before, but he did not read the warnings when he went to use it on the time in question on a particular patient. He used it in a negligent manner. But the Fourth Circuit held there was no causal connection, plaintiff could not prove proximate cause between the manufacturer and the injury because the product warnings had never been read.

The same rationale led to Judge Kiser reaching a similar conclusion in the Begley case, again cited on brief. In that case, the individuals used the forklift as a man lift, contrary to the warnings. The Court rejected the issue as to the adequacy of the warnings because it did not matter. The plaintiffs did not read the warnings. When they did not read the warnings, there could not be any causal connection, causal link.

Again, we cited a number of cases in the briefs and the plaintiffs cited a case in their brief, the Squid case from Alabama, which is a case where the individual needed insulin and he complained about the

adequacy of the warnings about the use of the insulin. The Court assumed that the warnings were inadequate, but went on to conclude that because the plaintiff didn't read the warnings, you could not prove that the warnings or any alleged inadequacy in the warnings was a proximate cause of the injury.

The warnings at issue, here, Your Honor -- and I'm probably going to have a problem with screens here. This is a little blurry, Your Honor.

These are the product warnings that were issued in May 1, 2010, Your Honor. These are in the record at, I believe, Exhibit I-16, Your Honor. I just wanted to highlight a couple for the Court's edification.

First, right off the bat on this warning, Your Honor, first sentence. "These safety warnings are for your protection as well as the safety of others. Disregarding this information could result in death or serious injury."

Plaintiff argues in their brief that Taser's warnings didn't show -- didn't warn sufficiently on the risk of death. Again, I'm not trying to get into the issue of the adequacy of the warnings, Your Honor, but I think it is instructive to know that indeed, the issue of death is addressed over 20 times in this product

warning and it is helpful to know these are the warnings that were issued on May 1, 2010, but they were not provided to Deputy Wright and not reviewed by Dr. Laughery.

The third paragraph, "Read and Obey. "Failure to comply with these instructions, warnings, information and training bulletins and Taser training materials could result in death or serious injury." Again, expressing the warning about death or serious injury from the use of a Taser.

Important, Your Honor, at the bottom of that page, "these warnings are effective as of May 1, 2010, and supercede all prior revisions and relevant training bulletins. The most current warnings are on line at www.Taser.com."

Back to that issue about whether 2009 warnings had been recanted. As of May 1, 2010, these are the warnings. They stand on their own. Nothing prior matters any longer.

This, Your Honor, I just carved it out separately to show you. Taser is showing, "Warning." This indicator, warning, means something to heed your attention to and if you do not abide by it, again, this could result in death or serious injury.

Here's one of the key elements of the

warnings, Your Honor. "Warning. Sensitive body part hazard." And it goes on to tell the user not to target the chest or breast. The preferred target areas are the lower center mass below the chest or front shots and below the neck area for back shots.

"Always follow and comply with all instructions, warnings, information and current Taser training materials to reasonably minimize the risk associated with possible use and side effects listed below."

This is in the record, Your Honor. It does go on to speak of cardiac arrest and impact on hearts and rhythm.

At the same time, Your Honor -- this is the product warnings. At the same time, we have the training materials.

The Version 17 training materials -- again, these are in the record, Your Honor. These are the ones issued on May 1, 2010. I've tried to excerpt just a couple I think are particularly relevant for the Court's consideration.

"Taser does not establish, recommend or endorse any use of force procedures, policies or tactics." Ms. Dillon earlier had a discussion briefly about use of force. I believe Mr. Miller also addressed

the issue. Taser doesn't establish where in the use of force continuum the Taser falls. Each department makes that determination.

Again, the May 1st warnings. "Taser ECD's are not risk free. At this time, review all current Taser warnings," referring back to the document we just looked at a moment ago, "contained in the safety manual."

Medical and safety slides in the training materials. "Risks of ECD application having a negative effect on a person's heart rate and/or rhythm is not zero. The risk of an ECD causing cardiac arrest is remote," but goes on to say current estimates are one in 100,000 applications.

Interestingly, Your Honor, and this is in Exhibit I-16 -- I didn't pull all these out for you, but I believe Exhibit I-16, page 22 or 23 in the record, the instructor notes, "highlight the source material for this slide." The source material for this slide is an article by John Webster, the plaintiff's expert. So Taser utilized the plaintiff's expert's own information to generate a slide, to provide the source information for this slide.

Same for this slide as well, Your Honor. Advising users to -- the dart is what comes out of the

Taser, Your Honor, and reference to dart to heart distance is exactly what it sounds like. The closer the dart is to the heart, Taser is warning, six months before this incident -- the further away the dart is from the heart, the lower the risks are of any impact on the heart.

Then we get into the preferred target areas, Your Honor. A couple slides on this. "When possible, avoid the chest." Reduces the risk of affecting the heart. It indicates the preferred target areas are in blue, again, as the Court can see, avoiding the chest.

This is a slide which shows again, targeting the lower torso.

"Warning. Avoid intentionally targeting the ECD on sensitive areas of the body, such as the head, throat, chest, breast or known pre-existing injury areas, without legal justification."

That phrase is important, "without legal justification." Again, the actual use of the Taser on the continuum is up to the law enforcement agency and the officer. There could be times where an officer would have no choice but to use it in one of these sensitive areas. Our job at Taser is to warn not to do it unless there is that justification.

Again, just a few more slides on the

preferred target zone, Your Honor. Again, the blue is the target area. Avoid the white. Notice bullet point three. "Increase dart to heart safety margin distance."

This is the back, showing that the back is safe or as safe as any location all together. And then again, the last slide, Your Honor, bullet point two, "Aim at preferred target zones." Bullet point three, "Avoid sensitive areas of the body." One thing I would point out on this one again, Your Honor, bullet point two, again, refers you back to the warnings.

So you have two documents generated on May 1, 2010, and made available. There's no dispute in the record they were e-mailed to and received by the Appomattox County Sheriff's Office in May 1, 2010. Yet there were never disseminated to any of the officers or deputies at that time.

The cases we've cited, the Rule case, the Begley case, a number of the other cases, Your Honor, we respectfully submit stand for the proposition you cannot prove causation in the absence of the officer reading these warnings. The logic is this. If these were inadequate -- we think they're adequate and you don't need to determine adequacy. But if there was a better warning, it wouldn't have mattered because the deputy never read them. So to prove causation, you have to

prove that it would have mattered. But because the Appomattox County Sheriff's Office did not deliver the warnings to the deputies, the warnings were -- the causation has not been proven, Your Honor.

In addition to the failure to prove causation, the plaintiff cannot prove defect. As I mentioned previously, Your Honor, Dr. Laughery has not reviewed the slides, has not reviewed the product warnings that we just looked at. If the warnings expert has not reviewed the slides that were generated six months before the incident -- again, plaintiffs argued on brief the issue is the warnings in place on October 30, 2010. Yet their expert hasn't reviewed them.

They say on page seven of their brief that they will offer evidence about the inadequacy of the warnings in their totality, but there's no citations to the record, Your Honor. To the extent they have relied at other locations of their brief on Dr. Laughery's report, I would submit again the report is not sworn, it is not an affidavit or declaration under the rules. But more importantly, because Dr. Laughery did not review the relevant warnings in place and in effect at the time, he doesn't bother to even offer any opinions nor could he about any inadequacies associated with those warnings.

The inability of the plaintiff to be able to prove causation or the existence of a defect in the warnings, Your Honor, is fatal to all of these claims.

In addition, there are other justifications for entering summary judgment with respect to the individual claims. For example, Your Honor, the negligence claims fail on theories of contributory negligence and assumption of the risk and the warranty claims fail because of the disclaimer of warranties. I'll talk briefly about those, Your Honor.

Contributory negligence, I'm not going to play the video yet again. I know the Court has seen it a couple of times. Simply put, Your Honor, we cited to the Valladares case, which was a use of force case and spoke for the proposition that an individual who, in that case, he was interfering with the arrest of his brother and essentially created a situation where the officers felt it was reasonable to use force on him. He was responsible for setting the course of actions in play that ultimately led to his injuries.

That's exactly what has happened in this case, Your Honor. From the decision to have the sufficient consumption of alcohol to reach the .17 blood alcohol level, from kicking his son, to fleeing his home, to exiting his car instead of staying in his car,

to advancing quickly toward the deputies, not getting on the ground, hands up, hands down, and ultimately, Your Honor, the decision to say, why don't you go ahead and Taser me and began, as Ms. Dillon's frame by frame analysis showed, began the process of taking two steps towards those deputies, was not acting reasonably. It unquestionably was foreseeable that it would result in the application of force on him by the officers. Therefore, we submit that contributory negligence defeats plaintiff's negligence claims.

Plaintiff, Your Honor, on his brief, does not contend that his client or that Mr. Russell was not contributorily negligent. Instead, he advances an argument that the contributory negligence and primary negligence must be concurrent. However, he cites two limited cases that deal specifically with medical malpractice area. In those cases, Your Honor, the situation was whether the patient who undertook some action which brought about his need for medical care or a patient after having received medical care undertook some action which didn't mitigate his own injuries, the Court said, no, in a medical malpractice case -- and it's very specific. All four cases we cited on briefs for that concurrence rule were medical malpractice cases. They said no. In the medical malpractice

context, there has to be a contemporaneous connection between the primary negligence and the contributory negligence. Indeed, to try to apply that rule to a products liability case would eliminate the application of contributory negligence all together. Whether it is a design or a manufacturing defect or a failure to warn, in almost all products liability cases, the alleged negligence of the manufacturer is going to predate the contributory negligence of the plaintiff. However, you know, the cases, Your Honor, are numerous which apply contributory negligence in the context of product liability claims.

The other allegation the plaintiff makes, Your Honor, is contributory negligence does not bar a claim where there is intentional tort or willful and wanton tort. The legal position is certainly appropriate. That is a correct statement of the law, but there's no evidence of willful or wanton conduct by Taser here. Willful and wanton conduct, the cases we cited in the brief, Your Honor, if a party shows care for the well-being of others, concern for the safety of others, then by definition, it is being -- it is not being willful and wanton, I should say. Here, the promulgation of the warnings shows care for the others. We looked at the first product warning, Your Honor,

which specifically highlighted that it was about concern for the officer's safety, as well as the safety of others. Respectfully, Your Honor, there can be no willful or wanton conduct where the manufacturer is generating those warnings.

Furthermore, Your Honor, again, what they would rely on, what plaintiff would rely on for this willful and wanton conduct is these recanting articles, these 3 or 4 documents which he alleges to recant warnings. Again, those predated the Version 16 training materials on December 4, 2009. Predated the May 1, 2010, product warning and training materials. So to the extent they could have even showed willful and wanton conduct, they cannot in the context of subsequent warnings which came out after the fact.

THE COURT: Again, though, and I think this is the worst thing that can be said for your case on causation, the plaintiff's point is that rightly or wrongly, in training this particular defendant and all the others, these guys came out of the training with the notion that the real concern was to prevent lawsuits such as this one, mismanagement concerns, and that really trumped any subsequent effort to try to say, well, we're really concerned about the well-being of these people you may Taser. That is the argument and the

fact of the matter is, both of these officers testified that they came out of their training sessions with the understanding that risk management was the primary objective in the instructions that they received.

MR. CARROLL: I suspect, Your Honor, when most corporations generate warnings, risk management is an aspect to it. I'm not sure --

THE COURT: They just don't say so in so many words, but that was the claim here.

MR. CARROLL: That's exactly right. But it's not an improper motive to try to manage the risk or try to reduce risk and safety. What they also said in those documents is yes, the risk is remote. As I mentioned before, the plaintiff's own experts agree the risk is remote. But they did say in those documents that by reducing the target zone, you further reduce those risks. The risks are already remote, but by reducing the target zone, you further reduce those risks. Again, there's no obligation under Virginia law to exaggerate a risk when you're putting out that information, when you're putting out new warnings. You don't have to overstate what the actual risk is. They gave an accurate statement. Indeed, their expert testified there was nothing inaccurate about those documents. They accurately stated the risks.

THE COURT: But you can understand the plaintiff's argument that these subsequent notices, these subsequent warnings, might, in a jury's eyes, might not be sufficient to disabuse a user of the potential risk, the real risk, the real reason that you don't want to shoot someone above the waist.

MR. CARROLL: I understand Your Honor's point. I would suggest in this case, Your Honor, the core break in the causal connection is the Appomattox County Sheriff's Office's failure on April of 2010 or I believe that's when it was, that Deputy Wright was trained. They have conceded, and nobody takes issue with it, they used a twice obsoleted set of materials. They used Version 14. Version 16 was out at the time. They used Version 14. Deputy Wright was specifically trained to target the torso because the Appomattox County Sheriff's Office erred and did not use the most recent, most current version of the training materials they had been sent and been received because Taser had already produced Version 16 which had the same -- the text is a little bit different, but it has the same blue man graphic as subsequently came out in Version 17.

If there's an issue as to whether Deputy Wright was instructed or was under the impression to target the upper chest, it's because Appomattox County

Sheriff's Office trained him improperly, using the wrong materials.

Again, those four documents that Mr. Miller will say recanted any previous warnings that had been issued by Taser, those came out before -- I won't say before -- while Deputy Wright was at Central Virginia Criminal Justice Academy. He had been elevated to a street deputy, but he had not reported to duty. I believe it was Christmas of '09 or early '10 when he actually reported for duty. So this alleged article that recanted warnings were before Deputy Wright was even a full time deputy. Again, he never saw any of them. He did, in February of 2010, sit in a staff meeting before he had ever been trained on how to use or anything about a Taser device where the issue of lowering the targeting zone was orally discussed. He had not been trained at that time. Again, there were subsequent warnings that came out. But most importantly, two months later -- he receives that training about lowering the target zone and two months later, he is specifically trained because of an error by the Appomattox County Sheriff's Office to target the upper torso. Again, this is not on Taser. Taser has already generated its warnings and generated its training materials which say lower the target zone below

the torso. Yet that information doesn't get to Deputy Wright. He doesn't read them and that's why there can be no causal connections because the warnings that were in effect at the time, the training materials that were in effect at the time never got to and were never read by Deputy Wright, Your Honor.

THE COURT: In those situations though, and I know that most of these cases lie in other contexts, but in those situations where a defendant cites some failure to train or some inadequacy in the training, doesn't it necessarily raise an issue as to whether or not the training materials that are provided, the instructions that the supervisors are given are adequate for the purpose and doesn't that really stand as a jury question?

MR. CARROLL: Respectfully, Your Honor, there's been no evidence of any defects. Sounds like --

THE COURT: He says they are. His experts say they are. His experts say that really, it didn't capture the ultimate concern here and that is that you could cause cardiac arrest by shooting people in the upper torso.

MR. CARROLL: Your Honor, I believe his argument was that the September, October, November, 2009 documents recanted the prior warnings. I think those

become irrelevant, utterly irrelevant, when you have the May 1, 2010, warnings which we just went through. Those have then been established. Taser has put those out, yet they don't make it to Deputy Wright, through no fault of Deputy Wright's. It becomes an issue of again the inability to show proximate cause because plaintiff says on brief, we look at October 30, 2010. He says Taser had not warned at that time of the risks.

THE COURT: He says these subsequent remedial efforts were not enough to disabuse Officer Wright of the notion that the real reason we recommend not shooting people in the upper torso is there's some possibility of litigation resulting therefrom.

MR. CARROLL: I understand Deputy Wright testifies to something to that extent in his deposition, but that notion came from one oral review of a document in February, 2010, before he is ever trained on how to use any ECD or anything about an ECD. Then two months later after he gets that oral discussion about a piece of equipment he's never been trained on, two months later, he is mistrained, if you will, and instructed to target the torso, by the sheriff's office. So I don't see how there can be a causal connection that those earlier documents, the late 2009 documents created this inclination Deputy Wright's situation to continue to

target the torso when he was specifically and erroneously trained to do so. Again, when you juxtapose that to these warnings, the current warnings, the ones in effect, the first page I indicated showed these May 1, 2010, warnings supercede everything that's come before. The effort is made to make it clear. These are our warnings. Reduce your target zone unless legally justified.

THE COURT: So in your view, would we have a triable issue if erroneous warnings had not been given?

MR. CARROLL: If erroneous warnings had not been given --

THE COURT: If they had not misinstructed the deputy, would there be a triable issue, given what we know about the case?

MR. CARROLL: No, Your Honor, because the warnings that would have been given at that time would have been Version 16 and they do have this blue man graphic and tell you to drop the target zone. Then we then, Taser subsequently issued the May 1, 2010, warnings which were sent to and received by the Appomattox County Sheriff's Office, and these warnings, whether you were trained on the Version 14 or the Version 16, these Version 17 and May 1, 2010, warnings never made it to Deputy Wright. So from Taser's

perspective, Taser has issued these warnings, disseminated and put these warnings in the hand of their customers and they did not make it to Deputy Wright in this case. That was through no fault of Taser. Therefore, Your Honor, I don't believe you have a triable issue because they can't prove any inadequacy in these warnings because these warnings were not read.

Furthermore, Your Honor, you wouldn't have a triable issue here because their expert has never looked at these warnings and has never offered an opinion these warnings were inadequate.

THE COURT: What else do you want to say about your motion?

MR. CARROLL: Your Honor, on the issue of disclaimer, we did brief the issue of disclaimer. I will move along, but the plaintiff has not taken issue with the fact they mention merchantability, are in writing and are conspicuous, Your Honor. That has not been argued. The argument they advanced on brief we dealt with in our reply. I will rest on the briefs.

We do take the position, Your Honor, the warranty claims fail because of the disclaimer of warranties and the exclusion of inconsequential damages, which would include an exclusion of personal injury claims.

Obviously, Your Honor, with regard to punitives, if indeed the claims do survive this motion, punitives should not be one of those because we did issue warnings, Your Honor, and we showed concern or the safety of others. Indeed, Your Honor, the plaintiff's own expert refers to the Taser as a good device, refers to Taser's doing a good job training and refers to it as an important device for law enforcement and under those facts, Your Honor, we respectfully submit it could not be proven Taser engaged in willful and wanton conduct.

I'll be glad to answer any questions.

THE COURT: That's fine, Mr. Carroll. Thank you.

MR. MILLER: Your Honor, Mr. Carroll did not have the benefit of sitting in on the deposition of the experts and the employees of Taser in this case. Mr. Carroll, smart man, but there's a misunderstanding here that I've got to explain to the Court.

First of all, my expert did read the pertinent warnings. He did review the pertinent warnings and the warnings that were in place that applied to Officer Wright were the ones that Officer Wright was trained on. It's very important that I get this subtlety across.

There are training versions. In this case,

training Version 14 is what the instructor for the entire Appomattox County police department was trained on. That training version has warnings with it. His instructions were to take that with you and use that when you teach the officers of Appomattox County how to use a Taser. So he should have used that until training Version 15 came out. Then what he should have done is gotten training Version 15 and had training Version 15 available until 16 came out and so on.

In this case, training Version 16 was the current version when Officer Wright was trained on the Taser. I walked through and had the opportunity to depose their expert in training and he, too, walked through all the slides between 14 and 16. Nothing significant changed and we have testimony on that. The warnings are identical in 14 and 16. Officer Wright was trained on that. Training bulletins that discussed "don't Taser someone in the chest" were discussed to Officer Wright. Officer Wright was a full up, trained user of a Taser. This all happened on April -- the end of April -- I want to say April 30th of 2010.

May 1, two or three days after Officer Wright's training, comes out training Version 17. Training Version 17 has attached to it the new warnings that are dated in May of 2010. I cleared this up with

the vice president of training with Taser, who is also their expert on warnings. I cleared this issue up with him and asked him, does training Version 17 apply in this case? The way I did it with him was hypothetical. If an instructor is trained on training Version 14 and he subsequently trains someone on a training version, is there any obligation on his part to retrain that individual or rebrief that individual when a new training version comes out, and no was his answer.

This is the vice president of training for Taser, also their training expert. I asked him on page 71 of the deposition in which he was an expert.

"Question: All right. If an instructor trains an end user, and for this hypothetical I'm going to use Version 14."

His answer is: "Okay."

My question: "And now the end user is out there on the street doing his job and a new training Version 15 comes out, what requirement, if any, is there to train that end user on 15?"

"There isn't any," is the answer.

Then I asked him: "He's a full up (indecipherable), a trained individual out there using a Taser despite the fact a new training version has come out."

His answer: "Correct."

Training Version 17 came out two or three days after Officer Wright was trained. They would love to say that, oh, there are brand new warnings and they did not train Officer Wright. There was no obligation, as per the vice president of Taser, as per their training expert. The fact he's bringing this up clearly shows Mr. Carroll didn't have the opportunity to be part of the deposition because that was clear.

More importantly, the warnings in training Version 17 state "don't tase the chest." They state the preferred target zone has been dropped and the reason is because they talk about safety. They want to help individuals out. Well, that's great.

The way you get training Version 17, the way Officer Burton, who's the training instructor for Appomattox County Sheriff's Department, was instructed to get his training version of Version 17 was to go to the website. It used to be they sent them a DVD, a DVD arrived in the mail. That process terminated on training Version 16 or 17. What we have on 17 is an e-mail to Officer Burton, go to the website and download training Version 17.

They also have numerous places on their documents, "always refer to the website, go to the

website." In fact, their expert says it's imperative that they go to the website.

Well, if Officer Burton would have gone to the website to get training Version 17 as they say was so important, which I clearly argue to you, was not and has no impact on this case, what you see on the website is a list of documents, training documents. This list of documents is the same as far as the first document goes today or at least was last month, as it was all the way back to 2009.

The first document someone would download is a memo or memorandum written by the vice president of training at Taser that goes on for three pages that says, yes, we've changed the preferred target zone and he says, "it's risk management, pure and simple" and spends an entire paragraph talking about lawsuits, not safety. There's nothing in here about safety.

When I deposed their electrical engineer, Dr. Panescu, Taser was well aware when this warning came out that it was safety and Panescu says it was safety. Panescu did a theoretical modeling on the human heart and how the Taser affects the heart. Panescu has a slide he developed prior to Taser's warning that shows a ten-fold increase in safety, not lawsuits -- safety -- if the targeting zone goes from directly over the heart

to 3 or 4 inches away from the heart. A ten-fold increase in safety. I deposed Officer Wright. Officer Wright was briefed on that training bulletin, which is the current attitude of Taser today, as per their vice president of training. He still has this document on line. Dr. Panescu, their expert, will state you've got a ten-fold increase and that's exactly how far they're asking to drop the targeting zone. So if you would listen to their warning, you would be outside of this area. It's a very accurate device.

The laser comes out of a Taser and there's two probes. They claim their laser to be, I believe it's 3 inches to 13 feet. So if you're 13 feet away and you put that laser red dot on someone's chest, you're going to be within three inches of that dot with the top probe and the bottom probe is going to be on an eight-degree flight path, which gives you about 7 inches to 14 feet -- I may not have that right, but the top probe is going to be a couple feet away from the top probe at the distance that they were.

I deposed Officer Wright and I asked him if he had a clear understanding of that memorandum and he said he did. The training bulletin would come out in between training versions and carry the message that gets incorporated into the next training version and

that message was incorporated on down the line. It was a lengthy document, training bulletin 15, that said it was risk management and safety, but it came out with a synopsis of it, a one-page copy of it. That one-page copy in January of 2010 was held up in front of all the officers of Appomattox County and explained that, listen, guys, it's risk management. I even had Officer Wright read this memorandum. When I said, Officer Wright, is that the memorandum that was read to you? He said, yes. Later on, he was unsure and said maybe it was the synopsis. But I said, are you clear on the attitude that they believe it's about lawsuits and not safety, and he said yes. I said, Officer Wright, if it would have been a stronger warning for safety and not risk management, would you have avoided putting that laser dot on Mr. Russell's chest, and he said yes.

It's clear Taser went out of the way, ignored Dr. Panescu and others who said it was a safety issue and determined it was a risk management issue. Behind the scenes, in deposing their CEO, it was a revenue issue. They were going to lose the sale of Tasers if it were be known to the forces out there, if you tase someone in the chest, you're going to have a cardiac arrest. It's much worse than just saying "let's avoid lawsuits." It's "let's avoid a loss in sales."

Let's run the risk of having someone suffer cardiac arrest, and this has happened numerous times, to let's not lose sales. That's the issue here. That's the punitive damages and I can certainly back that up, Your Honor.

What I think is very clear is so much of Mr. Carroll's argument was training Version 17. So much of his argument hinged on that and training Version 17 does not play in this case. Officer Wright was trained on training Version 14 when he should have been trained on training Version 16. But we went through a painful exercise of seeing what was different between the two. Nothing significant. Nothing that would have altered the course or altered the cause of Mr. Russell's death on the night of October 30, 2010.

Your Honor, the memo was also part and parcel of other documents that have been entered as exhibits and that is a frequently asked question. The CEO of Taser put out an e-mail saying, there's so many questions about this new preferred targeting zone, I'm going to answer questions on the phone. And this is information still true today, avoiding the risk versus safety. They sent out the frequently asked questions and answers to an email to Officer Burton. Can I still target the chest? Yes, is the answer, and it goes on to

talk about avoiding risk.

Your Honor, I think this case is incredibly clear and I think Taser went out of the way to make sure that unsafe actions were happening when it came to the use of Tasers.

Your Honor, contributory negligence does not play a part in this case. The reason we reached out on the case regarding the kidney issue, they're trying to say that because Mr. Russell had a heart condition that he's contributorily negligent in being tasered. That is so far afield, Your Honor, that we weren't sure what case law to use to support that. No one is responsible for their actions being arrested and having a Taser used on them based on their health condition. No one carries their medical record around. The case law, Valladares, that Mr. Carroll cited doesn't compare to this case either. Obviously, it was a brother who was standing by watching his brother be arrested and decided to dive into the scenario and help his brother. Certainly there's no evidence in this case that Mr. Russell did anything so aggressive. I don't need to go over that again, but clearly, he's standing there and not doing anything that compares to Valladares whatsoever.

Your Honor, I appreciate your time.

THE COURT: Thank you, Mr. Miller.

Mr. Carroll, anything else you would say about it?

MR. CARROLL: If I may, Your Honor.

THE COURT: Sure.

MR. CARROLL: Mr. Miller says Version 17 is not in play in this case, but, Your Honor, those are the warnings that Taser distributed to its law enforcement customers six months before this incident. Plaintiffs on brief, Your Honor, says the issue is what warnings were disseminated and in effect as of October 30, 2010. He says that several times in his brief, Your Honor.

We respectfully submit that is the key issue, what had Taser done, because that's who he wants to hold liable. It's not Appomattox County Sheriff's Office. He made the decision not to sue them over their failure to train. He made the decision to sue Taser. Taser, on May 1, 2010, issued Version 17, issued new product warnings and those, we respectfully submit, Your Honor, any inadequacy in those cannot be a causal connection to the injury because they were never seen by Deputy Wright. Your Honor, we have put the pages, I believe page 93 and 94, of Dr. Laughery's deposition, he says specifically he never looked at Version 17 and hasn't looked at the May 1, 2010 warnings. That's their warnings expert. He had not reviewed them.

Mr. Miller says there was no difference between the Version 14 warnings and Version 16 warnings. He now thinks Version 16 is important. He didn't put Version 16 into evidence. In fact, a lot of what he said when he was up here was not evidence before this Court. I don't think there's any excerpts from Dr. Panescu's deposition in evidence.

Version 16, I feel comfortable telling the Court, have the blue man graphic on it with the chest white, saying do not -- avoid targeting the sensitive areas, in that case, the chest, breast.

He also said the warnings between Version 14 and Version 16 were not different, yet his whole case is about a failure to warn about chest shots.

September 30, 2009, the warnings that were connected to the December, that were appended to the December 2009 issuance of Version 17 says, Your Honor, "when possible, avoid intentionally targeting the ECD on sensitive areas of the body, such as the head, throat, chest, breast or known pre-existing injury areas without legal justification." That's Exhibit I9 that we submitted. The warnings with Version 16 were almost identical to the warnings with Version 17 because they did warn about the chest, breast. So for Mr. Miller now to come here and say it's really about Version 16, but I didn't put

Version 16 in the record, even though he has to come here today and put on his evidence of how he's going to prove his case, I think is a little bit of a stretch, Your Honor, respectfully.

Your Honor, the speculation of motivations behind Taser. Again, to my recollection, I don't recall any evidence about a motivation behind Taser's decision to issue any of those memos. They accurately reported the risk as remote. They accurately reported we're trying to manage risk. There's nothing erroneous about it. Their expert said there was nothing inaccurate about those documents.

Mr. Miller comes in and speaks about this frequently asked questions e-mails. That was a late 2009 e-mail, completely rescinded and overridden by the December 2009 issuance of Version 16, which recommended, did recommend lowering the target zone and of course, subsequently overridden by the May 1st warnings and Version 17.

Your Honor, lastly, the one slide I showed Your Honor was we do not, Taser does not establish use of force practices. That's up to the law enforcement agency. They can take our information and train as they see fit. They can use the Taser if they want to without Taser training at all. But what we recommend is that

they use our most recent warnings. That's why the May 1, 2010, warnings and the May 1 training materials were made available and they, at that time, rescinded all pre-existing materials. That's all that can be asked of Taser. That's what Taser did. Taser gave warnings. You don't have to reach a decision as to the adequacy of those warnings I showed Your Honor. They are adequate as a matter of law, we would respectfully submit. I understand courts of Virginia are loathe to go down that path. But you don't have to reach the adequacy because Deputy Wright never saw them. Dr. Laughery never saw them. They cannot prove defect or causation.

We ask for entry of summary judgment, Your Honor.

THE COURT: Anything else, Mr. Miller?

MR. MILLER: Your Honor, very shortly.

I believe I heard Mr. Carroll just say the warning and training in Version 16 were almost identical to that of Version 17. That pretty much removes his entire argument because that's what we're talking about, the fact they're warning about not aiming at the chest and having a document on the website their CEO said he would not be surprised if it was on there today when I deposed him a couple months ago. It's not about the fact

there's a warning there or not. It's about the fact they came out with such a warning that would have saved the life of Mr. Russell on October 30 and then not to say it's inadequate. It's that it was totally removed. It was diminished to the point that Officer Wright, based on the information, the paperwork that came from Taser that is still in effect today, that I elected to put that laser dot on Mr. Russell's chest and I was sure cardiac arrest was not going to happen because that's what I learned from Taser and that's been the testimony.

Again, Your Honor, training Version 17, the reason my expert didn't read it is because it does not apply. The only reason training Version 17 was current on October 30, 2010, is if a new recruit would have shown up and said "teach me on the Taser," then they would expect the instructor to get that training Version with the new warnings and train him. As Mr. Carroll just said, would have been the same warnings on 16 as it would have been on 17. Had they gone to the website to get it, they would have gotten the same memo. Pure and simple, it's about risk management and it goes on to explain risk management is avoiding lawsuits because they don't want to be in court as they were today.

THE COURT: Mr. Miller, let me ask you to state in one sentence, perhaps two, what you believe to

be your viable claim against Taser. How would you characterize your claim against Taser?

MR. MILLER: Your Honor, my claim against Taser would be making an adequate warning null and void based on training bulletins and internal memos.

THE COURT: And what legal issue do you think is necessary for the Court to resolve that perhaps is not very clear under Virginia law at this time in deciding that issue?

MR. MILLER: Your Honor, I see it as a factual issue. What legal issue, I think it's very clear that the adequacy of the warnings jumps out at you when you read the memo. If that's a legal issue the Court needs to look at, I think would be a clear and easy one to resolve.

THE COURT: What cases do you think are dispositive in determining the adequacy of post sale duties to warn?

MR. MILLER: If the Court would entertain one second, I've got that marked.

THE COURT: Mr. Carroll, what do you think? What case do you think is most helpful along these lines?

MR. CARROLL: I'm sorry, Your Honor?

THE COURT: What case do you think is most

helpful for the Court to use in deciding the extent the adequacy of a post sale duty to warn?

MR. CARROLL: Judge Turk's recent King case addresses and does a very thorough job --

THE COURT: It addresses whether or not there's such a duty.

MR. CARROLL: Correct.

THE COURT: Which case helps us understand how that duty is discharged, assuming it exists?

MR. CARROLL: In this case, Your Honor, I would commend the Rule case, which I mentioned in oral argument and brief, Your Honor. That case, the warnings were given, the doctor didn't read the warnings, the doctor proceeded to use the medical device, Your Honor, in a manner contrary to the warnings and no causation could be proven because he did not read the warnings. Your Honor, we had a discussion here about Version 16 and Version 17 warnings. It's uncontroverted and unrefuted that Deputy Wright never saw any of them.

THE COURT: Surely if that duty exists, there has to be some shades of gray. There has to be some standard that determines when the duty is properly discharged, if there's a post sale duty to warn, which I don't think is a closed question.

MR. CARROLL: It is not a closed question.

Certainly the Virginia Supreme Court has never ruled on it.

I did not find a case specifically on that particular issue, other than I suppose the general adequacy cases, Your Honor.

THE COURT: Would it be different than any other duty to warn case?

MR. CARROLL: I think you would probably take the six factors and comment in, Section 383 of the Second Restatement of Torts, Your Honor, as to whether those six factors were met. Again, I think that is --

THE COURT: So it is the same.

MR. CARROLL: To the Court's point, I think that's the same analysis. I think the issue, there might be other issues because of the fact it's after the sale, delivery or things such as that. There's obviously been no evidence or opinion in that regard in this case. I guess that's the best answer to that question I came up with as I was preparing.

THE COURT: That's a fair answer.

MR. CARROLL: Again, Your Honor, I think that all goes down the path of adequacy, which is not necessary when it's uncontroverted all the warnings we're talking about were never read by Deputy Wright.

THE COURT: Mr. Miller, what do you have to

say?

MR. MILLER: Your Honor, two points. One is, I think I've covered the ground, he keeps continuing to say Officer Wright did not read the warnings. That's not a factor in this case and I stand by that.

When it goes to post market warnings, I would bring in Spruill vs. Boyle Midway, Inc., and that's from the U.S. Supreme Court of Appeals Fourth Circuit and they speak to the adequacy of a warning and that is an inadequate warning is not a warning and that is clearly what my expert is prepared to say.

THE COURT: Thank you.

Thank all three of you for challenging arguments. Again, I appreciate you appearing here in Roanoke today, even though this case is pending elsewhere.

When is the matter set to be tried?

MR. MILLER: January 14th, Your Honor.

THE COURT: The issues are a little more difficult than I would have thought coming in to today's hearing. We're going to try to get a ruling out to you in time for you to know how to prepare. It may be that it won't be released before the end of the year, but I suspect that if you haven't heard from us by the week after Christmas, you may call Ms. Moody or call in and

we can give you some hints about preparation, who needs to prepare, who doesn't and what issues may still be in play. But we'll try to have something out before that.

Any other questions? Any other problems that we need to deal with in terms of preparation of the case for trial?

MR. MILLER: Your Honor, no.

MR. CARROLL: We do have all the Daubert motions pending.

THE COURT: When do you want to set those to be heard? Would that be best done after the first of the year? I would think so.

MR. CARROLL: That's fine.

THE COURT: I'll let you contact Ms. Moody about that and hopefully we'll know the direction in which the case is headed by the time to conduct those hearings has rolled around.

Anything else?

MR. MILLER: No, Your Honor.

MS. DILLON: Thank you, Your Honor.

THE COURT: Ask the Marshal to declare the court adjourned for the day.

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sonia Ferris March 13, 2013"